

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EDWARD CARROLL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

CASE NO. 12-cv-01464-MJP

ORDER DENYING PLAINTIFF'S  
OBJECTIONS AND ADOPTING  
REPORT AND  
RECOMMENDATION

This matter comes before the Court on Plaintiff's objections to the Report and Recommendation issued by Magistrate Judge James P. Donohue. Having reviewed the administrative record, Report and Recommendation (Dkt. No. 20), Plaintiff's objections (Dkt. No. 21), and Defendant's response (Dkt. No. 22), the Court DENIES Plaintiff's objections and ADOPTS the Report and Recommendation.

**Background**

Plaintiff objects to the Report and Recommendation ("R&R") of the Honorable Magistrate Judge James P. Donohue on two bases: (1) the Administrative Law Judge ("ALJ")

1 | erred by rejecting the medical opinions of Plaintiff's treating physician, Dr. Storey; and (2) the  
 2 | ALJ erred by discounting Plaintiff's credibility and testimony. ("Objections," Dkt. No. 21 at 2.)  
 3 | The Magistrate Judge decided these issues against Plaintiff finding the ALJ did not err because  
 4 | she gave clear and convincing reasons supported by substantial evidence. (Dkt. No. 20, "R&R"  
 5 | at 7-18.) The Magistrate Judge did find the ALJ committed harmful error at step four of her  
 6 | disability evaluation and recommends remand for further proceedings, which Defendant does not  
 7 | oppose. (Id. at 18-26; Dkt. No. 22 at 2.)

8 | Plaintiff requests the Court adopt the Magistrate Judge's finding of harmful error, but  
 9 | otherwise decline to adopt the R&R and order remand for a finding of disability and payment of  
 10 | benefits. (Objections at 2, 13.) Alternatively, Plaintiff requests the Court remand the case for  
 11 | further consideration of Dr. Storey's opinions, Plaintiff's credibility and testimony, and a new  
 12 | residual functional capacity test. (Id. at 13.)

### 13 | **Discussion**

#### 14 | **A. Legal Standard**

15 | Under Federal Rule of Civil Procedure 72, the district judge must resolve de novo any  
 16 | part of the Magistrate Judge's report and recommendation ("R&R") that has been properly  
 17 | objected to and may accept, reject, or modify the recommended disposition. Fed. R. Civ. P.  
 18 | 72(b)(3); See also 28 U.S.C. § 636(b)(1).

#### 19 | **B. Plaintiff's Objections to the Magistrate Judge's Report and Recommendation**

##### 20 | **1. Objection 1: R&R Erroneously Affirms ALJ's Rejection of Dr. Storey's** 21 | **Opinions**

22 | Plaintiff objects to the R&R's finding the ALJ gave clear and convincing reasons to reject  
 23 | Dr. Storey's opinions. (Objections at 2.) To reject an uncontroverted opinion of a treating  
 24 | physician, an ALJ must state clear and convincing reasons supported by substantial evidence.

1 Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). The Court reviews only the reasons  
2 provided by the ALJ in the disability determination and may not affirm the ALJ on a ground  
3 upon which she did not rely. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

4 The ALJ gave a clear and convincing reason supported by substantial evidence for  
5 rejecting Dr. Storey's April 2009 opinion. The ALJ rejected the opinion as irrelevant to  
6 Plaintiff's disability claim because it did not describe Plaintiff's medical condition and  
7 functioning during April 14, 2001 to December 31, 2004 - the time period relevant to Plaintiff's  
8 Social Security Disability Insurance Benefits ("DIB") claim. (AR at 33; R&R at 2) In his April  
9 2009 opinion, Dr. Storey describes Plaintiff's limitations "at this time" and does not offer any  
10 opinion as to Plaintiff's limitations between April 14, 2001 and December 31, 2004. (AR at 292.)  
11 Though the ALJ did not discuss the April 2009 letter individually or in detail, she gave a clear  
12 reason for rejecting it. See Vincent on Behalf of Vincent v. Heckler, 739 F.2d 1393, 1394-95  
13 (9th Cir. 1984). The fact that the opinion does not relate to Plaintiff's proof of disability during  
14 the relevant period is a clear and convincing reason for rejection supported by substantial  
15 evidence.

16 The ALJ also gave clear and convincing reasons for rejecting Dr. Storey's December  
17 2009 and September 2010 opinions. The ALJ gave "scant weight" to those opinions because she  
18 found they were inconsistent with Dr. Storey's own treatment notes relating to Plaintiff's  
19 condition during the relevant time period and with Dr. Storey's more recent treatment notes from  
20 2009-2010. (AR 34-35.) The ALJ supported her finding with specific examples to demonstrate  
21 the inconsistencies drawn from Dr. Storey's treatment notes between 2000 and 2004 and in  
22 2009-2010. (Id.) Courts have expressly held contradiction between a treating physician's  
23 opinions and the physician's own clinical evidence is a clear and convincing reason for not  
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1 relying on the physician's opinion. See Bayliss, 427 F.3d at 1216 (citing Weetman v. Sullivan,  
2 877 F.2d 20, 23 (9th Cir. 1989)).

3        Though the ALJ's reasons for rejecting Dr. Storey's December, 2009 and September,  
4 2010 opinions are clear and convincing they must also be supported by substantial evidence in  
5 the record. Bayliss, 427 F.3d at 1216. "This is a highly deferential standard of review:  
6 'Substantial evidence' means more than a mere scintilla, but less than a preponderance. It means  
7 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Valentine v. Comm'r Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009). Where evidence is  
8 susceptible to more than one rational interpretation, the ALJ's conclusion must be upheld. Burch  
9 v. Barnhart, 400 F.3d 676, 679 (2005).

11        Plaintiff does not refute the evidence relied upon by the ALJ, but contends the ALJ  
12 cherry-picked contradictions in the record which, as a whole, does not justify the ALJ's rejection  
13 of a treating physician's opinions. (Objections at 4-5.) Though Plaintiff cites treatment notes  
14 from 2001-2009 that support Dr. Storey's opinions, Plaintiff's argument is misplaced. (Id. at 5-  
15 8.) The issue is not whether the preponderance of the evidence supports or undermines the ALJ's  
16 rejection. The issue is whether the ALJ's rejection of Dr. Storey's opinions is supported by  
17 enough evidence in the record to make the reasons for rejection reasonable. See Valentine, 574  
18 F.3d at 690.

19        The ALJ's rejection of Dr. Storey's opinions due to inconsistency with his treatment  
20 notes during 2000-2004 and 2009-2010 is supported by substantial evidence. In December 2009,  
21 Dr. Storey opined Plaintiff would not be able to sit or stand for any prolonged period (AR at 409)  
22 and, in September 2010, specified Plaintiff should alternate between 30 minutes of sitting,  
23 standing, walking, and "periods of lying down." (AR at 425.) Dr. Storey reported Plaintiff could  
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1 only work up to a total of six hours per day within these restrictions “on his best days” but would  
2 require one to two days of bed rest on his “worst days.” (Id.)

3 Dr. Storey’s contemporaneous notes from 2009 and 2010 contradict these opinions. (AR  
4 415-424.) The treatment notes consistently indicate Plaintiff’s pain medications “are controlling  
5 his symptoms nicely” (AR at 418) and his back pain is well managed (AR at 415.) Dr. Storey  
6 further reports Plaintiff’s “Gait and station are normal. Affect is appropriate. Low back exam is  
7 unremarkable,” (AR 417, 420), and Plaintiff’s back “remains stable” (AR 422) with a “normal  
8 range of motion.” (AR 422.) As the ALJ observed, these notes are at odds with Dr. Storey’s  
9 opinions reporting significant physical limitations. (AR at 34.)

10 In addition to Dr. Storey’s later notes, his notes during the period relevant to Plaintiff’s  
11 DIB claim contain examples that directly contradict Dr. Storey’s opinions. On July 31, 2002, Dr.  
12 Storey reported he had encouraged Plaintiff to continue playing golf because it improved his  
13 flexibility. (AR at 382.) On March 19, 2004, Dr. Storey reported Plaintiff was “increasing his  
14 activity” and “golfed without any significant problem.” (AR at 391.) On May 13, 2004, Dr.  
15 Storey reported Plaintiff had “no neurological deficit and negative straight leg raise” and  
16 Plaintiff’s “range of motion of lumbar spine is tolerated without any obvious limitations.” (AR at  
17 393.) On July 6, 2004, Dr. Storey reported Plaintiff’s “exam shows no sciatic tension. His range  
18 of motion is actually reasonably good. There is no mechanical instability in his lumbar spine and  
19 no local tenderness to palpitation.” (AR at 393.) On December 17, 2004, Dr. Storey reported  
20 that, overall, Plaintiff “seems much improved and in better spirits about his back. He has actually  
21 increased his physical activity now, including golf, without much discomfort.” (AR 397.) As the  
22 ALJ noted, these observations are directly at odds with any standing or walking restrictions. (AR  
23 at 33.)  
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Based on Plaintiff's treatment record, substantial evidence exists to support the ALJ's rejection of Dr. Storey's opinions as inconsistent and contradictory to his own treatment notes. Although Plaintiff correctly points to consistencies between Dr. Storey's opinions and notes, those consistencies do not disturb the existence of substantial evidence supporting the ALJ's finding. Because the ALJ's reasons for rejecting Dr. Storey's opinions are clear and convincing and supported by substantial evidence, the Court must uphold the ALJ's rejection of Dr. Storey's opinions. See Bayliss, 427 F.3d at 1216.

## **2. Objection 2: R&R Erroneously Affirms ALJ's Evaluation of Plaintiff's Credibility**

Plaintiff objects to the R&R's finding the ALJ gave clear and convincing reasons to discount Plaintiff's credibility. (Objections at 2.) Where, as here, a Plaintiff produces medical evidence of an underlying impairment and no affirmative evidence demonstrates the claimant is malingering, the ALJ must provide clear and convincing reasons to reject a claimant's testimony supported by substantial evidence in the record. Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008). The ALJ may not discredit the claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence, Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991), and must make "findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony." Tommasetti, 533 F.3d at 1039. The ALJ may, however, consider "ordinary techniques of credibility evaluation" including inconsistencies in testimony or between testimony and conduct, daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which the Plaintiff complains. Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996).

1 The ALJ discounted Plaintiff's credibility because Dr. Storey's treatment notes and  
2 reports that Plaintiff's pain was well-managed by his medication did not support, and in fact  
3 contradicted, Plaintiff's testimony regarding the intensity, persistence, and limiting effects of his  
4 symptoms. (AR 33-34.) Evidence of a favorable response to conservative treatment "is sufficient  
5 to discount a claimant's testimony regarding the severity of an impairment." Parra v. Astrue, 481  
6 F.3d 742, 750-751 (9th Cir. 2007); See also Tommasetti, 533 F.3d at 1040 (providing that a  
7 favorable response to conservative treatment "undermines [plaintiff's] reports regarding the  
8 disabling nature of his pain"). While, as Plaintiff correctly notes, lack of support in objective  
9 medical evidence is not, by itself, a sufficient basis to discount Plaintiff's credibility, it is still a  
10 relevant factor in the credibility analysis. Burch, 400 F.3d at 681.

11 The ALJ also discounted Plaintiff's credibility because his testimony regarding the  
12 disabling nature of his pain and inability to stand for more than 10-15 minutes was inconsistent  
13 with Plaintiff's reported activities that reflect a functional capacity for light work. (AR 34-35.)  
14 Evidence the Plaintiff has engaged in activity inconsistent with his alleged symptoms or claims  
15 of total disability is a proper basis to discount the Plaintiff's credibility. Molina v. Astrue, 674  
16 F.3d 1104, 1112 (9th Cir. 2012). Here, substantial evidence exists to support the ALJ's finding  
17 Plaintiff's reported activities directly contradict his claim of total disability. For example, Dr.  
18 Storey's treatment notes reflect, during the time period relevant to his claim, Plaintiff played golf  
19 without much discomfort (AR 391, 397), did "a lot of yard work," (AR at 378), did "a lot of  
20 wood carrying and splitting," (AR 381), moved a mattress (AR at 385), and was increasing his  
21 physical activity (AR at 391). The ALJ also noted Plaintiff "asked for increased pain medication  
22 in February 2000, after lifting his ill wife, and after operating heavy equipment and a wheel  
23 barrow while doing yard work. (AR at 34.)  
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1 Taken together, the ALJ's reasons for discounting Plaintiff's testimony are clear and  
 2 convincing and supported by substantial evidence in the record. The ALJ could reasonably  
 3 conclude Plaintiff's testimony was not credible because substantial objective evidence  
 4 contradicts the degree of physical limitation Plaintiff asserts.

5 **C. Plaintiff's Request for Remand for Payment of Benefits**

6 Plaintiff requests the Court remand for a finding of disability and payment of benefits.  
 7 (Objections at 3.) While "[t]he decision whether to remand the case for additional evidence or  
 8 simply to award benefits is within the discretion of the court," Stone v. Heckler, 761 F.2d 530,  
 9 533 (9th Cir. 1985), the Ninth Circuit lists three requirements that must be met in order to credit  
 10 rejected evidence as true and find disability: (1) the ALJ has failed to provide legally sufficient  
 11 reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved  
 12 before a determination of disability can be made, and (3) it is clear from the record that the ALJ  
 13 would be required to find the claimant disabled were such evidence credited. Bunnell v.  
 14 Barnhart, 336 F.3d 1112, 1115 (9th Cir. 2003).

15 Remand for a finding of disability and payment of benefits is not the proper relief in this  
 16 case because, as discussed above, the ALJ gave legally sufficient reasons for discounting Dr.  
 17 Storey's opinions and Plaintiff's testimony. Because Plaintiff does not meet the first prong, the  
 18 other elements need not be addressed. Plaintiff's request is DENIED.

19 **D. Plaintiff's Request for Remand for Further Consideration of Dr. Storey's opinions**  
 20 **and Plaintiff's testimony**

21 Alternatively, Plaintiff requests that the Court remand for further consideration of Dr.  
 22 Storey's opinions and Plaintiff's testimony. Again, because the ALJ gave legally sufficient  
 23 reasons to reject Dr. Storey's opinions and to discount Plaintiff's credibility, remand for further  
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1 consideration of Dr. Storey's opinions and Plaintiff's testimony is not necessary in this case. This  
2 request is also DENIED.

3 **Conclusion**

4 The Court DENIES Plaintiff's objections to the R&R because, on de novo review, the  
5 ALJ's reasons for discounting Dr. Storey's opinions and Plaintiff's credibility were clear and  
6 convincing and supported by substantial evidence. The Court ADOPTS the R&R and remands  
7 for further proceedings consistent with the R&R, which found harmful error at step four of the  
8 disability evaluation.

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10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated this 11th day of September, 2013.

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14 Marsha J. Pechman  
15 Chief United States District Judge  
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